

The economic activity of local self-government entities as public entities in Poland – exception or rule?

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Abstract

The economic activity of local self-government entities entails considerable controversy in Poland. There is no uniform view among the representatives of judicial doctrine and jurisprudence as to the admissibility of economic activity by local self-government entities, and when accepting the possibility of conducting such activity - as to the characteristics of such activity. The doubts also arouse the scope, object and possible forms of economic activity of local self-government. On the one hand, in the situation where legislator increases the number of public tasks given to self-government to perform, and members of local communities are demanding an increase in the quality of performed tasks, the question of additional sources of income, including possibility of conducting economic activity by local self-government entities, as a way to raise funds, becomes important. On the other hand, the pursuit gainful activity by entities of public administration creates the risk of their focus on profit maximization, and thus pursuit public objectives becoming of secondary importance. Pursuit business activity by local self-government is now permissible in Poland, but it is subject to many limitations. They relate to the nature of tasks that could be carried out within this activity as well as its organizational forms. The purpose of the study is to analyse the legal provisions, which are in force in Polish legal system, aimed at identifying and determination of the conditions for using the possibility of pursuit a business activity by local self-government units and evaluation their impact on the effectiveness of the performance of self-government public tasks.

Keywords: economic activity, local self-government, public entities, exception, rule.

JEL Classification: K23

1. Introduction

The entitlement to conduct economic activity by local government units finds both its opponents and supporters. The arguments against the admissibility of such activity include, in particular, the lack of the ability of the public-law association to carry out the effective activity in a market economy, improper management of municipal property, the possibility of local self-government to use its monopoly position, the danger of distorting the essential role of local self-government, i. e. an excessive focusing on conducting economic activity can weaken the activity in performing tasks aimed at directly meeting the needs of

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local communities.² The supporters of admissibility of conducting economic activity by public-law entities, including self-government entities, emphasize the appropriateness of including local self-government in the process of obtaining funds necessary for the implementation of tasks or the possibility of self-government implementation of specific intervention work functions, for example creating new jobs for unemployed.³

Pursuant to the Act of December 20, 1996 on municipal economy⁴ the possibility of conducting economic activity by local self-government units was allowed - at that time only by municipal self-government. In the literature it was emphasized that as a result of the passing of this act the municipality ceased directly to carry out public tasks in the service sphere and became their organizer or coordinator. The amendments introduced in this area also entailed the use of modern tools, including administrative and legal instruments. Such instruments include: financial planning in the long-term aspect, strategic planning, changes in the control system – the use of internal audit and management control.⁵ The privatization of public tasks, in turn, forced behaviour supporting local entrepreneurship. Innovation, knowledge and following changes in the administrative environment have become a feature of entrepreneurship.⁶

As a result of the systemic reform of 1998, which entered into force on January 1, 1999 and introduced, along with the municipal government, two subsequent levels of territorial self-government – the county self-government as the next level of local self-government and the voivodship self-government as the regional self-government level, it has been extended this possibility for the county self-government and the voivodship self-government. However conducting economic activity by local self-government units was separated in relation to its admissibility by self-government units, with regard to the admissible scope and possible form of conducting from the point of view of conducting the economic activity in the so-called sphere of public utility and outside this sphere, and at the same time subjected to strictly defined conditions resulting from the abovementioned act.

The regulations concerning the economic activity of local self-government units as public-law entities covered by the Polish legal system – despite their validity of twenty years – still give raise to many difficulties in interpretation. This

² L. Zacharko, Prawne aspekty prowadzenia działalności gospodarczej przez samorząd gminny w modelu europejskim [in:] M. Mączyński, M. Stec (ed.), *Działalność gospodarcza jednostek samorządu terytorialnego. Dopuszczalność i granice jej prowadzenia*, Wolters Kluwer Lex/el. 2016.

³ J. P. Tarno (ed.), M. Sieniuc, J. Sulimierski, J. Wyporska, *Samorząd terytorialny w Polsce*, Warsaw 2004, p. 58 and n.

⁴ The Act of 20th December 1996 on municipal economy, consolidated text Journal of Laws of 2017 item 827, hereinafter: The Act on municipal economy.

⁵ L. Zacharko, *Prawne aspekty prowadzenia działalności gospodarczej...*, Lex/el. 2016.

⁶ Szerzej B. Kozuch, *Pojęcie i istota przedsiębiorczości* [in:] H. Wnorowski, A. Letkiewicz (ed.), *Praktyczne problemy przedsiębiorczości*, Białystok 2001, S. Sudoł, *Przedsiębiorstwo. Podstawy nauki o przedsiębiorstwie. Teoria i praktyka zarządzania*, Toruń 2002, Z. Grzymała, *Restrukturyzacja sektora komunalnego w Polsce. Aspekty organizacyjno-prawne i ekonomiczne*, Warsaw 2010, K. Kuciński, *Przedsiębiorczość a rozwój regionalny w Polsce*, Warsaw 2010.

type of economic activity, however, still raises a number of controversies and emotions, both in terms of its admissibility and possible features, subject matter and scope and form of conducting.

Taking the above into account the scientific purpose of the research is to analyse the legal provisions, which are in force in Polish legal system, aimed at identifying and determination of the conditions for using the possibility of pursuit a business activity by local self-government units and evaluation their impact on the effectiveness of the performance of self-government public tasks.

The scientific method that has been applied is based on dogmatic scientific research and the typical for dogmatic of law - the logical-language analysis of legal text. Such a research method allows to carry out a thorough analysis of the content of relevant legal provisions. That scientific method has been supplemented by the use of the systemic interpretation and the functional interpretation. There have been also analysed the opinions of the representatives of judicial doctrine and jurisprudence.

As well as the results of the study is concerned, it should be stated that for the purpose of the study there were investigated two main issues. First of all, there were analysed the Polish legal provisions concerning conditions for using the possibility of pursuit a business activity by all local self-government units – the municipality, the county and the voivodship. According to the second purpose of the research, through the analysis of the abovementioned legal provisions, it has been made an attempt to evaluate the impact of abovementioned conditions on the effectiveness of the performance of self-government public tasks and it has been some *de lege ferenda* demands made.

2. The concept and characteristics of economic activity of local self-government entities

Among the representatives of the Polish legal doctrine, as well as in judicial decisions, there are no uniform views concerning the concept, the features and the scope of economic activity of local self-government units. According to one view, the performance of tasks in the sphere of public utility could not be treated as conducting an economic activity, while conducting activity outside this sphere should be treated as economic activity.⁷

According to another view, the economic activity of local self-government units is to perform tasks in the sphere of public utility which meets the features of the definition of economic activity contained in the Act on freedom of economic activity^{8,9} The third view, assuming a search for a compromise between the two

⁷ See judgment of Antimonopoly Court of 21 November 2001, XVII Ama 5/01, Lex No 56472, K. Bandarzewski, *Gospodarka komunalna i działalność gospodarcza samorządu terytorialnego* [in:] M. Mączyński, M. Stec (ed.), *Działalność gospodarcza jednostek samorządu terytorialnego. Dopuszczalność i granice jej prowadzenia*, Wolters Kluwer Lex/el. 2016.

⁸ The Act of 2 July 2004 on freedom of economic activity, consolidated text Journal of Laws of 2017 item 2168.

previously indicated, is based on the assumption that local self-government units could conduct an economic activity in the scope of the performing public utility tasks, but this is a special type of economic activity in which it is not an important element a striving to generate a profit (income).¹⁰ An arbitrary admission of any communal activity is an economic activity is, however, not acceptable.¹¹

In court decisions it was made an attempt to define the characteristics of economic activity conducted by local self-government units, however the views in this area do not have a uniform character. The indicated features include¹² performing the own tasks, professional and organized character of performing the task (including the implementation of the own tasks by having means to execute it), subordination to profitability and profit rules, but without maximizing the profit or even without profit,¹³ subordination to the rule of reasonable management,¹⁴ conducting activity in the conditions of self-employment, repetitive (continuous) nature of activity, consisting in planning the manner of task implementation by undertaking a sequence of activities, participating in the economic turnover, bringing revenues to the budget of a local self-government unit as a result of performing the own task (for example renting residential premises built by the municipality will generate income from rent payments).¹⁵

It should also be born in mind that the notion of profit, which is an essential and even constitutive element of the definition of an economic activity and which means that the activity is directed to income (profit, earnings),¹⁶ does not appear in the definition of municipal economy, and the criteria for performing public utility tasks eliminate this criterion indirectly.¹⁷ In the field of public utility

⁹ Judgment of the Court of Appeal in Warsaw of 17 April 2013, VI ACa 1371/12, Lex No 1331149, judgment of the Supreme Court of 19 October 1999, III CZ 112/99, OSNC 2000, No 4, item 78.

¹⁰ J. Frąckowiak, Pojęcie, powstanie i ustanie podmiotowości. Zagadnienia cywilnoprawne, Rejent 1998 No 5, p. 26, R. W. Kaszubski, K. Radzikowski, Wolność gospodarcza i warunki dopuszczalności jej ograniczeń, cz. I, Glosa 2000 No 3, p. 1, S. Czarnow, Działalność gospodarcza jednostek samorządu terytorialnego jako element gospodarki komunalnej, Rejent 2002 No 2-3, p. 26.

¹¹ Judgment of the Court of Appeal in Warsaw of 17 April 2013, K. Bandarzewski, *Gospodarka komunalna i działalność gospodarcza...*, Wolters Kluwer Lex/el. 2016.

¹² See judgment of the Court of Appeal in Poznań of 4 July 2006, IACa 232/06, Lex No 214294.

¹³ It is worth to note that in EU law an economic activity does not have to be profit-oriented, which allows non-profit activity to be considered as such – see for example judgment of the European Court of Justice of 16 November 1995 in case C-244/94, Lex No 116365. Moreover, in judgment of the Court of Appeal in Warsaw of 3 July 2003, I ACz 1313/03, *Wokanda* 2004, nr 7–8, s.72, it was decided that the municipalitie's economic activity is decided by its subject matter, not by its economic nature, similarly it was decided in judgment of the Supreme Administrative Court of 30 March 1994, SA/Lu 224/93.

¹⁴ See K. Bandarzewski, *Gospodarka komunalna i działalność gospodarcza...*, Wolters Kluwer Lex/el. 2016.

¹⁵ Judgment of the Court of Appeal in Poznań of 4 July 2006 – for K. Bandarzewski, *Gospodarka komunalna i działalność gospodarcza...*, Wolters Kluwer Lex/el. 2016.

¹⁶ K. Kohutek, Komentarz do art. 2 pkt 3.2 ustawy o swobodzie działalności gospodarczej [in:] M. Brożyna (ed.), *Swoboda działalności gospodarczej. Komentarz*, Wolters Kluwer Lex/el. 2005.

¹⁷ K. Bandarzewski, *Gospodarka komunalna i działalność gospodarcza...*, Wolters Kluwer Lex/el. 2016, see also judgment of the Supreme Administrative Court in Gdańsk of 9 January 2003, SA/Gd

the municipal economy, regardless of organizational and legal forms, should not be focused on making profits, but on meeting the needs of residents. Apart from the public sphere an economic activity of municipalities and voivodships has strictly defined statutory restrictions, the violation of which entails threats to economic freedom, violation of fair competition or leads to monopolistic practices.¹⁸

Conducting economic activity should not obscure public goals and excessively absorb the activities of municipalities and, in addition, specific public tasks municipalities are associated with the organization and creation the conditions for economic activity conducted by other entities.¹⁹ Local self-government bodies have the right to choose the organizational and legal form of the implementation of public tasks performed in the forms of private law.²⁰

3. Legal solutions for conducting economic activity by local self-government units at all levels

According to Article 2 of the Act on municipal economy, this economy could be performed by local self-government units in particular in the forms of a self-government budgetary establishment or commercial law companies. At the same time, in the light of Article 1 Paragraph 2 of that act, the municipal economy includes, in particular, tasks of a public utility nature whose purpose is to provide current and continuous satisfaction of the collective needs of the population through the provision of publicly available services. It means, therefore, that the tasks of public utility character of territorial self-government units, aimed at satisfying the collective needs of members of local and regional communities by providing universally available services to them, could be exercised in the form of commercial law companies, so in organizational and legal forms which are typical of conducting the economic activity.

The selection of the method of the way of conducting and forms of municipal economy is essentially settled by legislative bodies of local self-government units, which are, respectively, the municipality council or the city council in the municipality, the county council in the county and the voivodships council in the voivodship. These authorities were also entitled to decide on the amount of prices and fees or on the method of setting prices and fees for services of a public utility nature.²¹

1968/02, see also R. Płaszowska, *Pojęcie użyteczności publicznej jako wyznacznik ram dopuszczalności prowadzenia działalności gospodarczej przez jednostki samorządu terytorialnego* [in:] M. Mączyński, M. Stec (ed.), *Działalność gospodarcza jednostek samorządu terytorialnego. Dopuszczalność i granice jej prowadzenia*, Wolters Kluwer Lex/el. 2016.

¹⁸ L. Zacharko, *Prawne aspekty prowadzenia działalności gospodarczej...*, Wolters Kluwer Lex/el. 2016.

¹⁹ Judgment of the Voivodships Administrative Court in Olsztyn of 8 September 2011, I SA/O 458/11, Lex No 966077.

²⁰ L. Zacharko, *Prawne aspekty prowadzenia działalności gospodarczej...*, Wolters Kluwer Lex/el. 2016.

²¹ Article 4 Paragraph 1 Point 1 i Point 2 of the Act on municipal economy.

It follows from the above that one of the legal forms of municipal economy conducted by local self-government units are commercial law companies, and therefore the municipal economy could be carried out by local government units through performing the activity organized in the form of a commercial law company. According to the Act of 15 September 2000 Code of Commercial Companies,²² the commercial companies are the registered partnership, the professional partnership, the limited partnership, the limited joint-stock partnership and the limited liability company and the joint-stock company.²³

However, not all forms of commercial law companies operating in the Polish legal system, regulated by the Code of Commercial Companies, could be used by local self-government units. As it results from further provisions of the Act on municipal economy, local self-government units could use only two categories of commercial law companies. According to Article 9 of the Act on municipal economy, local self-government units could establish limited liability companies or joint-stock companies, and could also join such companies. This provision does not differentiate between the use of the indicated forms of companies by local self-government units in the sphere of public utility or outside this sphere. In addition, local government units may also establish limited partnerships or limited joint-stock partnerships, as referred to in Article 14 Paragraph 1 of the Act of 19 December 2008 on public-private partnership²⁴ - in the situation specified in this Act.

Therefore, it follows from the combination of the above provisions that local self-government units could conduct municipal economy consisting in performing public utility tasks by using limited liability companies and joint-stock companies, so companies belonging to capital companies with legal personality.²⁵ They are therefore the only possible forms of conducting economic activity in the sphere of public utility. On the other hand, as regards activity outside the sphere of public utility, the act does not indicate in general terms the admissibility of conducting such activity by all local self-government units. Due to the content of Article 9 Paragraph 1 of the Act on municipal economy, however, it should be assumed that if the possibility of conducting an economic activity outside the public utility sphere is allowed by the local government unit, this activity will also be limited in terms of the possible legal form to limited liability companies and joint-stock companies. In both these spheres, local self-government units could basically both establish the companies in question and join such existing companies.

From the list of personal partnerships, that is, those that are not legal entities and so-called flawed legal entities, i.e. organizational units without legal

²² The Act of 15 September 2000 Code of Commercial Companies, consolidated text Journal of Laws of 2017 item 1577, hereinafter as: Code of Commercial Companies.

²³ Article 1 Paragraph 2 of the Code of Commercial Companies.

²⁴ The Act of 19 December 2008 r. on public-private partnership, consolidated text Journal of Laws of 2017 item 1834, hereinafter as: Act on public-private partnership.

²⁵ See Article 4 Paragraph 1 Point 2 of the Code of Commercial Companies.

personality, which the law grants legal capacity, only a limited partnership and a limited joint-stock partnership could find application to local government activities, and only if such a company is established by a public entity and a private partner under public-private partnership agreement and for its implementation.²⁶ The purpose and object of the company's activity could not then go beyond the scope defined in the public-private partnership agreement.²⁷

On the basis of the above it should be pointed out that the Act on municipal economy applied a limitation of possible forms of conducting economic activity by local self-government units to specific categories of commercial law companies. Therefore, economic activity could be conducted by local self-government units only in strictly defined organizational and legal forms, belonging to only a small range of possible forms of conducting economic activity as such.

In addition, from Article 10a of the Act on municipal economy results the requirement of obligatory creation of a supervisory board in each company with the participation of local government units.²⁸ Thus, the legislator tightened the obligation to ensure the operation of the company's body in the form of a supervisory board in self-government companies. In the light of the provisions of the Code of Commercial Companies, the supervisory board is obligatory only in a joint-stock company,²⁹ and in a limited liability company only if the share capital exceeds five hundred thousand zlotys, and the number of shareholders exceeds twenty five persons. In addition, in a situation such as this under the Code of Commercial Companies, it is possible in relation to a limited liability company to create an alternative body to the supervisory board, which is the audit committee.³⁰ In the case of companies with the participation of local self-government units, a supervisory board should be established in each joint-stock company and in each limited liability company and it could not be replaced by the audit committee. The Act on municipal economy also regulates the issue of the length of the term of office of members of the supervisory board and its subjective composition. The term of office of a member of the supervisory board in companies with majority share of local government units should last three years.³¹ An entity representing a local government unit or a municipal legal entity in the scope of exercising rights from shares vested in these entities should, indicate as a candidate for a member of the supervisory body a person who meets the requirements referred to in the Act on the management of state property,³² excluding only the requirement of positive opinion of the Council for companies with participation of the State Treasury and state legal persons. The supervisory board in the company is the body that

²⁶ See Article 14 Paragraph 1 of the Act on public-private partnership.

²⁷ Article 14 Paragraph 2 of the Act on public-private partnership.

²⁸ See Article 10a Paragraph 1 of the Act on municipal economy.

²⁹ According to Article 381 of the Code of Commercial Companies, a supervisory board is established in the joint-stock company.

³⁰ See Article 213 Paragraph 2 of the Code of Commercial Companies.

³¹ Article 10a Paragraph 3 of the Act on municipal economy.

³² The Act of 16 December 2016 on the management of state property, consolidated text Journal of Laws 2017 item 2259.

exercises permanent supervision over the company's operations in all areas of its activity.³³

Due to the fact that the conditions of activity are different depending on whether the activity relates to the public utility sphere or beyond it, and within the distinguished two areas, the diversity also occurs in relation to individual local government units, in the following part of this article it would be analysed the issues of conducting economic activity by particular local self-government units with the specification of the sphere of public utility and the area outside this sphere.

4. Conducting the economic activity by the municipalities

It follows from the Article 10 of the Act on municipal economy that the municipality could conduct economic activity both in the sphere of public utility and also outside this sphere, and therefore outside the performance of public utility tasks, whose aim is to provide current and continuous satisfaction of the collective needs of the population through the provision of services widely available.

The municipality's conduct of economic activity in the sphere of public utility has not however been subject to specific conditions. This means that while maintaining general requirements regarding possible forms of conducting economic activity - that is, creating and joining precisely defined categories of companies – conducting such activity by the municipality in this area does not require fulfillment of any specific conditions. However, it should be remembered that activity in the public utility sector should not be aimed at achieving profit, but to achieve public goals by performing tasks and providing necessary services to members of the local community.

However, a different solution was envisaged when it comes to conducting economic activity outside the public utility sphere. The established provision of Article 10 of the Act on municipal economy provides that, outside the public utility sphere, the municipality could establish commercial law companies and join them if the following conditions are jointly met:

- 1) there are unmet needs of the local community on the local market;
- 2) unemployment in the municipality has a significant negative impact on the living standard of the local government community, and the application of other actions and legal measures resulting from the applicable provisions has not led to economic activation, and in particular to a significant revival of the local market or permanent reduction of unemployment.³⁴

In addition, the municipality may also establish commercial law companies and go into them also if the disposal of a municipal property component which may constitute a non-cash contribution of a municipality to the company or disposing of it in another way will cause a material loss to the municipality.³⁵

³³ See Article 219 Paragraph 1 and Article 382 Paragraph 1 of Code of Commercial Companies.

³⁴ Article 10 Paragraph 1 Point 1 and Point 2 of the Act on municipal economy.

³⁵ Article 10 Paragraph 2 of the Act on municipal economy.

The abovementioned restrictions on the creation of commercial law companies and joining to those companies outside the public utility sphere do not apply to the possession of shares or stocks of companies dealing in banking and insurance activities as well as advisory, promotional, educational and publishing activities for the benefit of local self-government as well as other companies important for the development of the municipality, including sports clubs operating in the form of a capital company.³⁶ This means that also outside the public utility sphere, the municipality could acquire and hold without any restrictions shares or stocks of companies dealing with banking and insurance activities as well as advisory, promotional, educational and publishing activities for the benefit of local self-government as well as other companies important for the development of the municipality, including sports clubs operating in the form of a capital company. On the background of the wording of the analysed provision, two conclusions arise. First of all, the municipality could join the companies dealing with banking and insurance activities as well as advisory, promotional, educational and publishing activities for the benefit of local self-government as well as other companies important for the development of the municipality, including sports clubs operating in the form of a capital company, and not establish such companies. Secondly, the catalog of these companies remains open as a result of the legislator's inclusion of 'other companies important for the development of the municipality'. The application of such a legislative procedure means that the municipality could enter, purchasing shares or stocks, into companies other than companies engaged in banking, insurance and advisory, promotional, educational and publishing activities for local self-government, justifying accession by the fact that such a company is a company important for the development of a given municipality. The legislator does not indicate at the same time which companies should be considered as important for the development of the municipality, as well as which entity would have to decide about it. It seems logical and understandable, because the development of individual municipalities is shaped differently, and therefore various factors may be important factors for this development, and thus determine what types of companies will be considered important for the development of a given municipality. Therefore, this provision provides flexibility in recognizing what kind of companies would be companies important for the development of the municipality, and thus those into which the municipality could enter by acquiring their shares without restrictions, outside the sphere of public utility. At the same time, this provision creates a certain risk of abuse in this respect, i.e. the acquisition by municipalities of shares or stocks of companies that only seemingly constitute companies important for the development of the municipality, and thereby circumventing the conditions set by the legislator.

³⁶ Article 10 Paragraph 3 of the Act on municipal economy.

5. Conducting the economic activity by the counties

The Act on municipal economy does not apply to conducting economic activity by the second level of local self-government in Poland, which are counties. It means, therefore, that the counties could conduct economic activity only in the sphere of public utility in restricted forms of limited liability companies and joint-stock companies. The economic activity of these local self-government units outside the sphere of public utility has thus been excluded.³⁷

In addition to the limitation regarding the organizational and legal form, the operation of counties in the sphere of public utility does not experience any limitations. In turn, the activity outside the public utility sphere is not possible at all.

6. Conducting the economic activity by the self-government voivodships

As regards the economic activity of regional self-government units - self-government voivodships - its conduct in the sphere of public utility is similar to that of other local government units - it is acceptable without subject limitation, subject to only the requirements under Article 9 of the Act on municipal economy on the scope of commercial law companies that may be created or entered into and the requirement to establish a supervisory board in each company, as well as to take into account the objectives to which public utility activities should aim.

In relation to activities outside the public utility sphere, the Act on municipal economy refers in Article 10 Paragraph 4 to the Act on voivodship self-government^{38, 39}.

Such a solution raises doubts. Since in relation to the municipality the conditions of economic activity outside the sphere of public utility result from the Act on municipal economy, there is no comprehensible reason for their indication in the self-governmental system of law when it comes to another level of self-government - the voivodship self-government. The legislator should maintain uniformity of solutions in this area.

In order to determine the conditions of the economic activity of the voivodship outside the sphere of public utility, it should be made reference to Article 13 of the Act on the voivodship self-government. However, it should be pointed to the inconsistency of the legislator in the analyzed scope. Against the wording of the provision of Article 10 Paragraph 4 of the Act on municipal economy, in Article 13 of the Act on the voivodship self-government the self-

³⁷ See R. Płaszowska, *Pojęcie użyteczności publicznej jako wyznacznik...*, Wolters Kluwer Lex/el. 2016.

³⁸ The Act of 5 June 1998 r. on voivodship self-government, consolidated text Journal of Laws of 2017 item 2096, hereinafter as: Act on the voivodship self-government.

³⁹ According to Article 10 Paragraph 4 of the Act on municipal economy, outside the public utility sphere, the voivodship may establish commercial law companies on principles and in forms defined in the Act on the voivodship self-government.

government of the voivodship is not limited to the indication of the conditions of the activity of this local government unit only outside the public utility sphere, but refers to the indication of forms of this activity, regardless of the Act on municipal economy, also in this area.

According to the wording of Article 13 of the Act on the voivodship self-government, in the sphere of public utility, the voivodship could establish limited liability companies, joint-stock companies or cooperatives, and could also join such companies or cooperatives.⁴⁰ The scope of possible forms of conducting economic activity by voivodship self-governments in the sphere of public utility has been extended in relation to the solutions of the Act on municipal economy by the possibility of establishing the cooperatives and joining them. In addition, in this area the legislator pointed to the possibility of establishing by the voivodship a special limited liability company or a joint-stock company whose subject of activity will be activities related to the implementation of the voivodship development policy, defined as a regional development fund.⁴¹

Outside the public utility sphere, the voivodship self-governmental may in turn establish limited liability companies and joint-stock companies and join them if the activities of the companies consist in performing promotional, educational, publishing activities and telecommunications activities serving the development of the voivodship, which results from Article 13 Paragraph 2 of the Act on the voivodship self-government. The activity of the voivodship self-government outside the sphere of public utility in its subject matter is therefore limited to performing promotional, educational and publishing activities, if it serves the development of the voivodship. In addition, telecommunications for the development of the voivodship may constitute its possible subject. The last of the indicated admissible subjects of the activity of this local self-government unit in the analysed sphere seems to be quite accidental at the same time. It is difficult to imagine what kind of telecommunications activity to develop the voivodship would it lead to.

7. Establishment of a company based on the Act on public-private partnership

As a special situation of conducting economic activity by local self-government unit, it should be also indicated the creation of a company by such a unit, acting as a public partner, with a private entity in order to fulfill obligations resulting from the concluded agreement on public-private partnership. According to Article 14 Paragraph 1 of the Act on public-private partnership, a public-private partnership agreement could provide that for its implementation, a public entity, which may also be each of the local self-government units, and a private partner will bind a capital company, thus provided for in the Act on municipal economy a

⁴⁰ Article 13 Paragraph 1 of the Act on the voivodship self-government.

⁴¹ Article 13 Paragraph 1a in connection with Article 11 Paragraph 1 of the Act on the voivodship self-government.

limited liability company or joint-stock company, but also a limited partnership or limited joint-stock partnership, which belong to personal partnerships. Therefore, in the case of establishment by the local self-government unit as a public entity a company serving the implementation of the undertaking as part of a public-private partnership, the catalog of possible companies to be used was extended to include companies belonging to the category of partnerships. However, the Act stipulates that if such a company is established, a public entity may not be its general partner.⁴² A public entity, including the local self-government unit, could not therefore have the status of a partner who bears unlimited liability for the company's obligations.

The purpose and the object of the activity of such a company was subject to the severity of the Act on public-private partnership. According to its Article 14 Paragraph 2, the purpose and object of the company's activity could not exceed the scope specified in the public-private partnership agreement. Therefore, it could not go beyond the provisions of the agreement, which means that such a company is a special purpose company only for the implementation of a public-private partnership agreement concluded between public entity and a private partner.

In addition, in the event of establishing the company in question, the public entity has the right of pre-emption of shares of a private partner. This right could be exercised within two months from the date of notification of the public entity by the private partner about the content of the contract concluded with a third party, unless the public-private partnership agreement provides for a longer period of time. The sale by a private partner of shares without the public entity's ability to exercise the right of pre-emption is invalid under the Act on public-private partnership.⁴³

8. Conclusions

Polish legal provisions create a wide range of opportunities for local self-government entities as public-law entities to carry out economic activity. Each of the self-government units is able to undertake and conduct such activity aiming at performing the tasks assigned to them to serve the collective needs of members of local government communities through the provision of publicly available services. Formal restrictions in this respect concern only the legal forms that such activity should take, which are limited liability companies and joint-stock companies. This limitation seems understandable due to the importance of capital, characteristic of such companies, not the personal involvement of partners, as in personal partnerships, as well as due to the requirement of having appropriate share capital

⁴² Article 14 Paragraph 1 sentence 2 of the Act on public-private partnership, see wider K. Płonka-Bielanin, *Spółka komandytowa jako forma realizacji umowy o partnerstwie publiczno-prywatnym* [in:] M. Mączyński, M. Stec (ed.), *Działalność gospodarcza jednostek samorządu terytorialnego. Dopuszczalność i granice jej prowadzenia*, Wolters Kluwer Lex/el. 2016.

⁴³ Article 16 of the Act on public-private partnership.

and the related exclusion of personal liability of partners, thus in the analysed situation - local government units - for the company's obligations.

Also outside the sphere of activity in the scope of meeting the collective needs of members of self-government communities by providing necessary services for them, the Polish legal system provides for the possibility of conducting economic activity by local self-government units. The activity in this area is, however, further limited in scope - apart from the necessity of using forms of capital companies and - when it comes to self-government voivodships - also cooperatives - the act introduces prerequisites for which it would be possible to conduct such activities. These prerequisites are of a functional and objective nature - they are based on allowing the possibility of operating in strictly defined situations, as regards municipalities, and in specific subject areas - as regards self-government voivodships. In relation to counties, the conditions of economic activity outside the public utility sphere were not foreseen at all, which should be read as a symptom of the inadmissibility of such activities on the part of the counties. Such a solution seems incomprehensible. It is not known what factors the legislator was guided by, allowing a limited possibility of economic activity outside the sphere of public utility of municipalities and self-government voivodships and excluding it in relation to counties. The provision of self-government voivodships in an additional possible form of conducting activity, both in the sphere of public utility and outside that sphere - a cooperative - and in an additional possible subject of the activity - telecommunications activity, even if it would serve the development of the voivodship, is also not comprehensible. From the point of view of the rules of legislative technique, it does not seem appropriate to formulate the conditions of economic activity of the voivodship self-government in the provisions of the systemic Act on the voivodship self-government in a situation where analogous conditions concerning municipality and county self-government are included in the Act on municipal economy. After all, this act was to serve to allow and shape the conditions of economic activity of local self-government units.

It should be concluded that despite the limitations that are not rationally justified in every case, conducting economic activity by local self-government units may be used not only to carry out mandatory tasks imposed on local governments, but also to eliminate unfavorable social and economic phenomena on the territory of individual municipal communities, to support educational and promotional activities for the benefit of the regions, and finally to obtain additional financial means to finance the various public tasks that lie upon them. At the same time, the scope of restrictions of activity outside the public utility sphere is to be used to prevent abuse of public-law entities, as well as members of their authorities. As a far-reaching in this respect, it should be solely assessed the total exclusion of the possibility of conducting activities outside the public utility sphere by the county self-government.

It is difficult to state clearly whether in the current legal status resulting from the provisions of Polish law, conducting economic activity by local self-

government units is a rule or an exception to it. The economic activity of local self-government units is admissible, but it is not a free activity pursued by private law entities. Due to the fact that local self-government units belong to public-law entities whose primary purpose is to perform public tasks and satisfy public needs, it is fully justified to subject that activity to specific legal conditions. Such a situation also takes place in Poland. The possibility of conducting economic activity has been provided to self-government entities, however, provided that certain requirements are maintained, which are to guarantee the attitude of local government entities to achieve the objectives for which they were appointed as public law entities, as well as the implementation of other constitutional values, such as ensuring the social character of the national economy, sustainable development, guarantees of non-infringement of the principle of free competition by preventing preferences for public entities, or applying any discrimination of non-public entities.

Finally, it is worth to emphasize that the activity of local self-government units in the field of economic activity is one of the most complex, and at the same time the most basic, even fundamental systemic and organizational institutions that allow to perform public tasks, conduct municipal economy, provide public services and influence local governments widely understood public sphere, and even outside it. The practical implementation of the authorization of local self-government units to conduct economic activity is, therefore, widely recognized as one of the most visible and simultaneously most complex manifestations of decentralization of state function and real independence in organizational and functional terms of basic decentralized entities of public administration, which are local self-governments.⁴⁴

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⁴⁴ M. Mączyński, M. Stec, *Wstęp* [in:] M. Mączyński, M. Stec (ed.), *Działalność gospodarcza jednostek samorządu terytorialnego. Dopuszczalność i granice jej prowadzenia*, Wolters Kluwer Lex/el. 2016.

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